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No. 83-1156

ALEXANDER L. STEVENS.
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In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN R. WILSON, ET AL., CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Cross-petitioners contend that 25 U.S.C. 194, which places the burden of proof on the "white person" in a suit by an Indian over title to property, violates the Due Process Clause because it creates an invidious racial classification.¹

1. This Court has twice denied certiorari on this exact question in this case. See *Wilson v. Omaha Indian Tribe*, 439 U.S. 963 (1978);² *Wilson v. Omaha Indian Tribe*, 449

¹The United States has filed a petition for a writ of certiorari in this case (No. 83-952) which raises a single question for review unrelated to the question raised by cross-petitioners herein. The factual background of this litigation is set forth in our petition at pages 2-6. See also *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

²The first question presented in No. 78-160 by cross-petitioners herein was "[w]hether Title 25 U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian' as construed and applied by the Eighth Circuit is unconstitutional because it is invidious racial discrimination and deprives Petitioners of their property and of the equal protection of the law in violation of the Due Process Clause of the Fifth Amendment." The Court limited its grant of certiorari to Questions 2 and 3 (439 U.S. 963 (1978)).

U.S. 825 (1980).³ Moreover, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 678 (1979), this Court held that "[b]y its terms, § 194 applies to the private petitioners," i.e., cross-petitioners herein. Application of the challenged statute by this Court may fairly be viewed as a *sub silentio* rejection of cross-petitioners' constitutional claim.

Review of the issue tendered by cross-petitioners is no more appropriate now than it was on the prior occasions when the Court declined to consider the question. There is no conflict among the circuits. Indeed, cross-petitioners themselves state (Cross-Pet. 11) that the constitutionality of 25 U.S.C. 194 is a question of first impression.⁴ Moreover, even in the instant case, the question has received little attention. The district court did not consider the constitutional question, and the court of appeals discussed the question in a footnote (*Omaha Indian Tribe v. Wilson*, 575 F.2d 620, 631 n.18 (8th Cir. 1978), vacated and remanded on other grounds, 442 U.S. 653 (1979)). And, although cross-petitioners rely heavily (Cross-Pet. 9-11) on this Court's decisions in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), no lower court has considered the constitutionality of Section 194 in light of those decisions.

³One of the questions presented by cross-petitioners herein in their petition for a writ of certiorari in No. 79-1741 was "[w]hether Title 25, U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian', is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment." That petition was denied *in toto* (449 U.S. 825 (1980)).

⁴Shortly before the filing of the cross-petition, one other circuit considered and upheld the constitutionality of 25 U.S.C. 194. *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983). Two decided cases in the nearly 150 years of the statute's existence hardly suggest the existence of a problem requiring this Court's attention.

Accordingly, we believe it would be inadvisable for the Court to consider the constitutionality of the statute without the benefit of the views of the lower courts, and without the experience gained from the application of the statute in a variety of factual contexts.

2. In any event, as this Court stated in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), the resolution of cross-petitioners' due process claim must turn "on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." The Court there concluded that Congress's judgment in adopting "legislation that singles out Indians for particular and special treatment" will be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians" (417 U.S. at 554-555). In *United States v. Antelope*, 430 U.S. 641, 645 (1977) (footnote omitted), the Court reaffirmed this analysis, holding that:

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Section 194, like the other special Indian legislation this Court has upheld, is directly related to the fulfillment of the United States' special obligation toward its Indian wards by protecting their most valuable property, their lands. In order to safeguard these vital Tribal resources, Section 194

rationally provides that a non-Indian claimant has the burden of proof when an "Indian shall make out a presumption of title in himself from the fact of previous possession or ownership." See Comment, *Federal Indian Burden of Proof Statute: 5th Amendment Due Process Considerations*, 19 Nat. Resources J. 725 (1979).

It is therefore respectfully submitted that the cross-petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984